Nos. 11-338 and 11-347

FILED
OCT 23 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR LAW PROFESSORS AS AMICI CURIAE ON THE PROPRIETY OF ADMINISTRATIVE DEFERENCE IN SUPPORT OF RESPONDENT

AMY J. WILDERMUTH
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu

SANNE H. KNUDSEN
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 221-7443
sknudsen@uw.edu

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION AND INTEREST OF THE AMICI CURIAE 1

STATEMENT 4

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. *AUER* DEFERENCE IS INAPPROPRIATE WHERE AN AGENCY INTERPRETATION CONTRAVENES CLEAR STATUTORY MANDATES 12

II. *AUER* DEFERENCE IS INAPPROPRIATE WHEN AN AGENCY'S INTERPRETATION OF A REGULATION IS MARKED BY A HISTORY OF REBUKES BY COURTS AND CONGRESS 15

III. *AUER* DEFERENCE RAISES THE RISK OF ARBITRARINESS WHEN AN AGENCY INTERPRETATION FAILS TO AFFORD THE REQUISITE FAIR NOTICE 29

IV. *SKIDMORE* DEFERENCE IS ALSO NOT WARRANTED 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 9, 10

Chevron USA, Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1983) 9, 13

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 11, 12, 29, 35, 36

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009) 9

Gonzales v. Oregon, 546 U.S. 243 (2006) 10

League of Wilderness Defenders v. Forsgren, 309 F.3d 1182 (9th Cir. 2002) 20, 21, 27

Natural Res. Def. Council, Inc. v. United States Envtl. Protection Agency, 25 F.3d 1063 (D.C. Cir. 1994) 14

NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 18, 19, 20, 27

NRDC v. Train, 396 F. Supp. 1393 (D.D.C. 1975) ..... *passim*

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ... 8, 9, 35, 36

Stinson v. United States, 508 U.S. 36 (1993) 14

Talk America v. Michigan Bell Telephone, 131 S. Ct. 2254 (2011) 11, 12, 15

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Earth Sciences Inc., 599 F.2d 368 (10th Cir. 1979) 21

United States v. Mead Corp., 533 U.S. 21 (2001) 8, 36

United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973) 21

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 13

STATUTES

33 U.S.C. § 1311 (2012) 4

33 U.S.C. § 1342 (2012) ..... *passim*

33 U.S.C. § 1362 (2012) 5

33 U.S.C. § 1369 (2012) 5, 15

LEGISLATIVE MATERIALS

Pub. L. No. 100-4, 101 Stat. (1987) 23

117 Cong. Rec. 38,805 (1971) 17

118 Cong. Rec. 10,765 (Mar. 29, 1972) 22

131 Cong. Rec. 15,616 (June 13, 1985) 23

131 Cong. Rec. 19,846 (July 22, 1985) 23

132 Cong. Rec. 32,380 (Oct. 16, 1986) 24

H.R. Rep. No. 93-1012, 93 Cong., 2d. Sess. 55-60 (1974) 18

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS AND REGULATORY MATERIALS

40 C.F.R. § 122.26 (2012) 32

40 C.F.R. § 122.27 (2012) 28

40 C.F.R. § 122.3 (2012) 34

38 Fed. Reg. 18,000 (July 5, 1973) 16

41 Fed. Reg. 6,281, 6,281 (Feb. 12, 1976) 16, 17, 19

41 Fed. Reg. 24,709 (June 18, 1976) 19

43 Fed. Reg. 37,078 (Aug. 21, 1978) 20

55 Fed. Reg. 20,521 (May 17, 1990) 26

55 Fed. Reg. 47,990 (Nov. 16, 1990) 32

64 Fed. Reg. 46,057, 46,077 (Aug. 23, 1999) 20

65 Fed. Reg. 43,586 (July 13, 2000) 21

OTHER AUTHORITIES

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1 (1996) 8, 10

Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) 8

Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009) 8

TABLE OF AUTHORITIES – Continued

Page

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) 8, 9

INTRODUCTION AND INTEREST OF THE AMICI CURIAE

The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amici Curiae are law professors who research, teach, and write on federal environmental law as well as administrative law. They are concerned in this case by the Government's claim – in the face of clear statutory language and announced for the first time in this litigation – that the Environmental Protection Agency (EPA) regulations are unclear and that, because those regulations are now supposedly ambiguous, this Court should defer to the agency's new interpretation of those regulations. More information about the specific interest of each professor is provided below.

Lincoln L. Davies is a Professor of Law at the University of Utah S.J. Quinney College of Law. Professor Davies' research and teaching interests center on energy and environmental law and policy, administrative law, and water law.

Eric T. Freyfogle is the Guy Raymond Jones Chair in Law at the University of Illinois College of

---

[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief.

Law. He is the author or editor of a dozen books dealing with issues of humans and nature, and is the co-author of two casebooks, *Property Law: Power, Governance, and the Common Good* (Thomson/West 2012) and *Wildlife Law: Cases and Materials* (Foundation Press, 2002; 2d ed. 2010). Seven of his law review articles have been reprinted, as among the best articles of the year, in the annual volume *Land Use & Environment Law Review*.

Noah Hall is an Associate Professor of Law at Wayne State University Law School and is a frequent Visiting Professor at the University of Michigan Law School. His teaching and expertise is in environmental and water law, and his research focuses on public and private water rights, transboundary water management and pollution, climate change adaptation, U.S.-Canadian environmental law, and citizen enforcement. He is a co-author of two casebooks, *Environmental Law and Policy: Nature, Law, and Society* (Aspen Publishers) and *Modern Water Law: Private Property, Public Rights, and Environmental Protection* (Foundation Press).

Amanda Cohen Leiter is an Associate Professor of Law at the American University Washington College of Law. Her teaching and research interests include torts, administrative law and process, and environmental law and policy.

Dave Owen is an Associate Professor of Law at the University of Maine School of Law. He teaches courses on environmental, natural resources, water,

and administrative law, and his research focuses largely on water resource management. Several of his articles have focused on the Clean Water Act's coverage of stormwater.

Jessica Owley is an Associate Professor at SUNY Buffalo Law School where she teaches environmental law, property, and land conservation. Her research covers those areas as well as administrative law and statutory interpretation.

Zygmunt J. B. Plater is Professor of Law at Boston College Law School, teaching and researching in the areas of environmental, property, land use, and administrative agency law. Over the past 30 years he has been involved with a number of issues of environmental protection and land use regulation. He is lead author of *Environmental Law and Policy: Nature, Law, and Society*, now in its fourth edition, Aspen Publishers, 2010.

William H. Rodgers, Jr. is the Stimson Bullitt Endowed Professor of Environmental Law at the University of Washington School of Law. He specializes in natural resource law and is recognized as a founder of environmental law. He is the author or co-author of dozens of books, casebooks, and articles, including his four-volume treatise, *Environmental Law* (Thomson/West).

Colette Routel is an Assistant Professor of Law at the William Mitchell College of Law. Her teaching and research interests include administrative law,

federal Indian law, and environmental and natural resources law.

Ryan Stoa is Program Executive Officer of the Global Water for Sustainability Program at Florida International University, where he teaches Water Resources Law, the Environmental Law and Policy Clinic, and Integrated Solutions for Water in Environment and Development.

STATEMENT

In order to control water pollution in the nation's waters, the Clean Water Act requires a permit for any discharge into navigable waters from a "point source." *See* 33 U.S.C. §§ 1311(a), 1342(a) (2012). Permits do not eliminate discharges. They instead set limits based on national standards that determine the appropriate treatment of polluted water before it is added to a larger body of water such as a river or a lake. *See id.*

Respondent filed this suit six years ago alleging that private logging corporations harvesting timber in the Tillamook State Forest were violating the Clean Water Act by discharging stormwater into navigable waters without a permit. 2JA 2; Pet. App. 55a. Respondent's concern stemmed from a man-made water collection and drainage network created along logging roads and used by logging corporations to collect polluted stormwater generated by logging operations. 2JA 2, 15, 17-18. The water in the culverts, ditches,

and pipes of the system eventually flows into rivers and their tributary streams. *Id.*

Because the Clean Water Act defines the terms "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), and because the Act requires permits for all stormwater discharges "associated with industrial activity," *id.* § 1369(p)(3)(A), Respondent contends that, based on the plain language of the statute, these are discharges from point sources that require a permit. The EPA, however, argues that this Court should exempt these discharges from permits based on its interpretation of several regulations that it now claims are ambiguous. *See* U.S. Br. at 19-32.

SUMMARY OF ARGUMENT

The Government's brief in this case is striking. After being on notice for decades that the EPA has a duty to regulate point source discharges of stormwater from logging operations, the Government now says that the EPA's regulations related to those discharges are ambiguous. The Government then asks this Court to defer to the EPA's interpretations of those regulations announced "for the first time" in this case.

This Court should give effect to the clear terms of the Clean Water Act. It should not be persuaded to do otherwise by the EPA's late claim that the regulations are ambiguous and that it must now interpret those regulations. Even assuming that those regulations are ambiguous, (and it is not clear that they are), the Court should not afford deference (1) when the agency has not been suitably mindful of congressional intentions and (2) when deferring to an agency interpretation would increase the risk of arbitrariness. In those cases, deferring to an agency raises separation of powers concerns and would therefore be inappropriate.

In this case, although Congress has neither exempted silvicultural activities nor all stormwater discharges from the National Pollutant Discharge Elimination System (NPDES) permit requirement, the EPA's interpretation of its regulations would do just that. This Court owes no deference to an interpretation that is contrary to the legislative structure and control that Congress has otherwise seen fit to exercise in this area.

Even if the Act itself did not resolve this case, deferring to the EPA's interpretation would still be inappropriate because it would raise insurmountable separation of power concerns. The EPA's approach to regulating silvicultural point sources has been plagued with a history of rebukes by courts and Congress that, not coincidentally, illustrate the resistance of the agency to follow clear statutory mandates. In particular, since 1975, courts relying on the

plain language of the Act have repeatedly told the EPA that it cannot exempt these point sources. Rebukes have also come in the form of Congressional amendments to force regulatory action where the EPA had been reluctant to regulate stormwater discharges.

The final indicia that deference in this case is inappropriate stems from the fact that both the Silvicultural Rule and the Phase I rule, if interpreted in the way urged by the EPA, would implicate the Court's concerns regarding open-ended and imprecise regulations. In particular, the EPA seeks to refine the Phase I rule for the first time through this litigation. Whereas the Phase I rule is clear in its inclusion of logging as an industrial activity, the EPA now argues that timber hauling and access for big machines necessary to log, both of which are essential to logging, are not industrial activities. To accomplish this spontaneous carve-out, the Court would have to read imprecision into the rule. Doing so would create significant latitude for the agency to decide on an ad hoc basis that which it is otherwise required to do through notice and comment rulemaking – namely identify industrial activities whose stormwater discharges are subject to the NPDES permit program. In other words, accepting the EPA's interpretation would allow the EPA to create de facto new regulations through the interpretive process. *Auer* deference is therefore inappropriate.

Finally, because the EPA's interpretation is inconsistent with the underlying statutory mandates of the Clean Water Act, because it lacks thoroughness in

that it was announced for the first time in an amicus brief in this litigation, and because courts have found that the EPA's reasoning in prior efforts to exempt silvicultural sources from the NPDES program suspect for nearly four decades, the EPA's reasoning is "wholly unpersuasive" and should be afforded no deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

ARGUMENT

One of the most debated questions in administrative law is the proper deference to afford agency interpretations of both statutes that they administer and regulations that they promulgate. Commentators have long debated when and why deference to agency interpretations is afforded, with many questioning whether deference is appropriate at all. *See, e.g.*, Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 (2009); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1, 11-12 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613-14 & nn.9 & 10 (1996). Similarly, Justices on this Court have questioned the application of deference in various contexts. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (questioning

the Court's re-adoption of *Skidmore* deference in lieu of applying *Chevron* deference); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295-96 (2009) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the articulation of deference in that case for being too complicated).

Central to this case is the question of what deference, if any, is owed to an agency interpretation of its own supposedly ambiguous regulations. Although the Court embraced a general principle of deference in this context in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), Professor John Manning has warned that deference in this situation raises a separation of powers problem: "*Seminole Rock* leaves an agency free both to write a law and then to 'say what the law is' through its authoritative interpretation of its own regulations." 96 COLUM. L REV. at 618. Because "administrative agencies exercise[ ] delegated lawmaking authority, as well as perform[ ] executive and adjudicative functions," Professor Manning has argued that "it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes." *Id.* at 682. He has therefore urged the Court to "replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning." *Id.* at 617.

Similarly, Professor Robert Anthony has argued that *Seminole Rock* deference should be abandoned in favor of respectful consideration to the agency position:

> Agencies will realize that they can issue such documents – creating tangible meaning where the regulations did not – with a high degree of confidence that their interpretations, issued without notice and comment, will be upheld because they are not inconsistent with the regulation. This prospect generates incentives to be vague in framing regulations, with the plan of issuing "interpretations" to create the intended new law without observance of notice and comment procedures.

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1, 11-12 (1996).

Skepticism of *Seminole Rock* or *Auer* (based on *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) deference, which inspired Professor Manning's and Professor Anthony's articles, can be found in several of this Court's cases. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."); *cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (finding *Auer* deference inappropriate because "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). The concern has been particularly pointed in the last two Terms.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012), the Court declined to afford the agency interpretation *Auer* deference after noting that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit. . . ." In that case, the Court determined that the requisite fair notice was lacking: "to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference" would be unfair. *Id.*

Similarly, in *Talk America v. Michigan Bell Telephone*, 131 S. Ct. 2254 (2011), Justice Scalia announced that "while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity." *Id.* at 2266 (Scalia, J., concurring). Justice Scalia then echoed the concern raised by Professor Manning:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. . . . [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.

Id. The problem with applying *Auer* deference in *Talk America*, Justice Scalia explained, was that it involved "an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Id.* In other words, *Auer* deference is

inappropriate in situations in which an agency has repeatedly ignored statutory language in seeking the same end.

In order to ensure an external check on the consolidation of power in the administrative state that troubled Justice Scalia in *Talk America* and led to concerns in *SmithKline Beecham*, the Court should be cautious in affording *Auer* deference when there are indicia of separation of powers concerns. Such indicia arise when the agency has not been suitably mindful of congressional intentions – whether those intentions appear in the form of limits on delegated authority or legislative mandates – and when deferring to an agency interpretation would increase the risk of arbitrariness. In this case, several indicia implicate separation of powers concerns. First, as in *Talk America*, the agency interpretation in this case is inconsistent with the statutory language. Second, also as in *Talk America*, the agency interpretation has a history of repeated rebukes by courts and Congress. Finally, like *SmithKline Beecham*, the agency's interpretation has the potential to generate such great imprecision that it fails to afford the requisite fair notice.

I. *AUER* DEFERENCE IS INAPPROPRIATE WHERE AN AGENCY INTERPRETATION CONTRAVENES CLEAR STATUTORY MANDATES.

Agencies are empowered to act only when they have been delegated authority by Congress to do so.

See, e.g., Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) ("[W]hen Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). As such, the Court has long held that, in order for an agency's interpretation of a statute to be given any weight, it must be consistent with the statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1983).

Likewise, this Court has also explained that interpretations of agency regulations must be consistent with the statute. *See, e.g., Stinson v. United States*, 508 U.S. 36, 47 (1993) (requiring that an interpretation of a regulation, among other things, "does not run afoul of the Constitution or a federal statute"); *see also Natural Res. Def. Council, Inc. v. United States Envtl. Protection Agency*, 25 F.3d 1063, 1070 (D.C. Cir. 1994) (Sentelle, J.) ("Of course, however reasonable the agency's interpretation of its regulations, we must not give those regulations effect if they conflict with the governing statute."). As such, in order to avoid both separation of powers concerns and delegation questions, this Court will not give effect to an interpretation of regulations that is inconsistent with the statute under which the relevant regulations were passed. In other words, regulatory interpretations that contravene clear statutory mandates warrant no deference.

The Government, however, contends that this Court may not look to the underlying statute because that effort would bring into question the validity of the regulations at issue. *See* U.S. Br. at 20-21. Implicit in this argument is the suggestion that the Government can offer an interpretation that contradicts the clear language of the statute and this Court should nevertheless defer to it. That simply makes no sense. This Court should not give effect to any proffered interpretations of regulations that contravene

the plain text of the Clean Water Act's definition of "point source" or its Stormwater Amendments.[2]

II. *AUER* DEFERENCE IS INAPPROPRIATE WHEN AN AGENCY'S INTERPRETATION OF A REGULATION IS MARKED BY A HISTORY OF REBUKES BY COURTS AND CONGRESS.

As Justice Scalia explained in *Talk America*, the "inappropriateness of *Auer* deference is especially evident in cases . . . involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The EPA's approach to regulating silvicultural point sources has been plagued with a history of rebukes by courts and Congress that, not coincidentally, illustrate the resistance of the agency to follow clear statutory mandates. Those rebukes have come in the form of direct invalidations by courts in the face of the EPA's attempt to exclude point sources from regulation. They have also come in the form of Congressional amendments to force regulatory action where the EPA has otherwise been

---

[2] To the extent Petitioners and the Government argue that this Court should disregard the statute because of the presence of 33 U.S.C. § 1369(b), Respondent has explained why that statute does not alter ordinary rules of interpretation. Resp. Br. 20-22.

reluctant to regulate stormwater discharges. A short review of the regulatory history in this case highlights not only the rebukes but also the EPA's minimal efforts to meet statutory mandates even in the face of rebukes. Together, the rebukes and the EPA's actions in response suggest that this Court cannot defer to the EPA's regulatory interpretation regarding silvicultural point sources.

A. Past and Present Forms of the Silvicultural Rule Have Been Rejected By Courts to the Extent that the Rule Excludes Statutory Point Sources From Regulation.

1. In 1973, the EPA adopted regulations to establish the scope of the NPDES permitting program. *See* 38 Fed. Reg. 18,000 (July 5, 1973). Though the Clean Water Act requires NPDES permits for all point source discharges, the EPA attempted to limit the scope of the permitting program only to certain types of point sources. *See id.*; *see also* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976). In particular, the EPA attempted to exempt categorically all silvicultural activities from the NPDES program. *See* 41 Fed. Reg. at 6281.

Shortly after the EPA purported to exempt certain point sources from coverage under the Clean Water Act, the U.S. District Court for the District of Columbia rejected the EPA's approach. *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The court explained that

"there is no evidence from the language of the statute to support the categorical exemptions of point sources granted by the Administrator." *Id.* at 1398. In addressing the EPA's concerns regarding administrative feasibility, the court concluded that "the statutory framework now at issue appears too tightly drawn to allow the interpretation made by the EPA." *Id.* at 1400. The court's conclusion was consistent with congressional pronouncements at the time of enactment: "In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do." 117 Cong. Rec. 38,805 (1971) (Statement of Senator Jennings Randolph of West Virginia, Chairman of the Senate Committee responsible for the Clean Water Act).

As a result, the district court in *Train* vacated the 1973 Rule, including the silvicultural exclusions, and remanded the issue to the EPA to propose and promulgate regulations "extending the NPDES permit system to include all point sources." *See* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976) (quoting district court's remand order). The district court's conclusions were consistent with the House Committee on Government Operations, which had been monitoring the EPA's administration of the 1972 Clean Water Act. In the context of discussing the EPA's exclusions for confined feedlots of a certain size, the subcommittee remarked that "there is no legal basis for EPA's

administrative exclusion of any point source from the NPDES permit program under the Federal Water Pollution Control Act. The law requires that all point sources be subject to the permit program." *See* Subcommittee Staff Memorandum of March 11, 1974, printed in House Comm. on Government Operations, Control of Pollution From Animal Feedlots and Reuse of Animal Wastes, H.R. Rep. No. 93-1012, 93 Cong., 2d. Sess. 55-60 (1974), cited by *Train*, 396 F. Supp. at n.6.

On appeal, the D.C. Circuit affirmed the *Train* decision, explaining that the EPA could not exempt point sources from the NPDES program:

> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

NRDC v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977). In reaching this conclusion, the court gave detailed consideration to the EPA's arguments that technological and feasibility limitations justified a categorical exclusion for agricultural, silvicultural, and storm sewer runoff. *See Costle*, 568 F.2d at 1377-83. While the court discussed various tools that the Clean Water Act provided the EPA to alleviate technological limitations and administrative burdens, the court concluded that Congress did not intend regulatory

exclusions to be included in those tools: "We find a plain Congressional intent to require permits in any situation of pollution from point sources. We also discern an intent to give EPA flexibility in the structure of the permits, in the form of general or area permits." *Id.* at 1383.

2. In the wake of *Train* and *Costle*,[3] the EPA adopted new regulations. *See* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976) (Proposed Rule); 41 Fed. Reg. 24,709 (June 18, 1976) (Final Rule). In those regulations, the EPA identified silvicultural point sources that would be subject to regulation under the NPDES program:

> The term "silvicultural point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters.

41 Fed. Reg. at 24,710 (1976 Final Rule).

---

[3] As required by the district court in *Train*, the EPA proposed and promulgated new regulations while the appeal was pending. *See* 41 Fed. Reg. at 6281 (explaining that the EPA is proceeding with the appeal but promulgating rule to remain in compliance with district court order).

The EPA has admitted at various times that the Silvicultural Rule identifies only a subset of silvicultural activities that constitute point sources under the statute. Indeed, at various points in the regulatory history of the Silvicultural Rule, the EPA proposed to regulate a broader range of silvicultural point sources. *See, e.g.*, 64 Fed. Reg. 46,057, 46,077 (Aug. 23, 1999) (proposing to expand category of silvicultural point sources that would be regulated); 43 Fed. Reg. 37,078 (Aug. 21, 1978) (proposing to regulate additional silvicultural point sources on a case-by-case basis).

Nevertheless, the Forest Service relied on the Silvicultural Rule in a case a decade ago to argue that the four listed activities in the Silvicultural Rule are the *only* types of silvicultural activities that require a permit. In *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the question before the court was whether the Forest Service was required to obtain an NPDES permit for its annual aerial insecticide spraying over 628,000 acres of national forest land in Washington and Oregon. The Ninth Circuit rejected the argument that such activity was excluded, reiterating that "the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of point source by 'defining' it as a non-point source." *Id.* at 1190. Consistent with *Train* and *Costle*, and in order to ensure that the Silvicultural Rule comports with statutory requirements, the court in *Forsgren* read the four point source activities listed in the Silvicultural Rule as nonexclusive. The *Forsgren* decision

is consistent with the EPA's own recognition that the Silvicultural Rule does not actually identify all silvicultural point sources.[4] Recognizing the statutory mandates to regulate all point sources, however, *Forsgren* makes clear that the point sources left unidentified by the Silvicultural Rule must still obtain a permit. *See also United States v. Earth Sciences Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (holding that agricultural and silvicultural activities, construction activity, and mining activities are not exempt from the Clean Water Act; such activities "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *cf. United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (concluding that the Rivers and Harbors Act of 1899 requires a permit to discharge and explaining that the agency's failure to set up a permitting program did not alleviate the discharger from the Act's prohibitions).

In this case, the EPA insists again that the Silvicultural Rule allows it to exempt point source silvicultural activities from regulation under the Clean

---

[4] As recently as 2000, the EPA acknowledged that the Silvicultural Rule does not regulate all point sources within the meaning of the Clean Water Act. *See* 65 Fed. Reg. 43,586, 43,650 (July 13, 2000) (Final Rule) (explaining that the 1999 proposal would have "provided all NPDES permitting authorities with sufficient authority to regulate 'physical' point source discharges from silvicultural sources not already subject to NPDES permit requirements."). The EPA ultimately decided against expanding the scope of the Silvicultural Rule. 65 Fed. Reg. at 43,650.

Water Act. Since 1975, however, courts have repeatedly told the EPA that the plain language of the Act dictates otherwise.

B. The EPA's Interpretation of the Silvicultural Rule Would Contradict Legislative Control that Congress Has Exercised in the Area of Point Source Exemptions to Regulation.

Against the backdrop of the EPA's attempt in 1973 to create regulatory exclusions for silvicultural point sources it is helpful to recall that where Congress has intended exclusions, it has provided them. Irrigated agriculture provides a good example of Congress's stingy attitude toward point source exemptions. At the time that Congress enacted the Clean Water Act in 1972, Congress was well aware that discharges from irrigated agriculture would fall within the broad definition of point source. *See* 118 Cong. Rec. 10,765 (Mar. 29, 1972). Though some members of Congress supported an amendment that would exempt irrigated agriculture from the NPDES program, Congress rejected that amendment in keeping with its intent to read point source broadly. *See* 118 Cong. Rec. 10,765 (Mar. 29, 1972).

In 1977, however, Congress alleviated the EPA's burden of issuing permits for every agricultural point source by adopting a statutory exemption for return flows from irrigated agriculture. 33 U.S.C. § 1342(l)(1). Congress's actions in 1977 are notable for

three reasons. First, Congress amended the statute where it intended a narrower application of "point source." Second, Congress continued to be stingy with exemptions from the NPDES program. To that end, it did not exempt all agricultural point sources – it limited the exemption to return flows from irrigated agriculture. Third, Congress did not grant a similar statutory exemption to silvicultural activities.

Like irrigated agriculture, stormwater discharge is another area in which Congress originally anticipated regulation under the NPDES program but eventually made revisions to accommodate tougher realities. In 1987, Congress enacted amendments to the Clean Water Act specifically to address stormwater regulation. Pub. L. No. 100-4, 101 Stat. (1987).

The 1987 Amendments were a mixed bag in terms of Congress's traditionally hard line on regulating point sources. On the one hand, Congress alleviated administrative burdens for some categories of stormwater dischargers that fell outside primary areas of concern. *See* 131 Cong. Rec. 19,846, 19,850 (July 22, 1985) (statement of Rep. Rowland); 131 Cong. Rec. 15,616, 15,657 (June 13, 1985) (statement of Sen. Wallop). For these categories, Congress would give the EPA greater time and latitude for addressing stormwater discharge. *See* 33 U.S.C. § 1342(p)(1) (putting moratorium on permit program for Phase II discharges). At the same time, however, even for these categories of lesser concern, Congress set firm deadlines so that the ultimate job would get done. *See* 33 U.S.C. § 1342(p)(5) (requiring the EPA to study the

nature and extent of Phase II discharges and submit a report to Congress); § 1342(p)(6) (setting deadline for the EPA to publish regulations on how to address Phase II stormwater discharges).

On the other hand, for categories of concern, the 1987 amendments signaled a wake-up call to the EPA. Congressional reports leading up to the 1987 amendments underscore Congress's disappointment with the EPA for failing to regulate stormwater discharges under the 1972 Act. *See*, *e.g.*, 132 Cong. Rec. 32,380, 32,400 (Oct. 16, 1986) (Sen. Stafford, Chairman of Committee on Environment and Public Works) ("EPA should have developed this stormwater program long ago. Unfortunately, it did not.").

One of the key areas of concern for Congress was stormwater discharge associated with industrial activities.[5] *See* 33 U.S.C. § 1342(p)(2)(B) (stating that the moratorium on permitting shall not apply to a "discharge associated with an industrial activity"). For industrial dischargers and other Phase I categories, Congress left the EPA no discretion over whether to require permits and placed the EPA on a strict compliance schedule to issue regulations and permits

---

[5] Other categories of concern, collectively referred to as Phase I categories, included stormwater discharges that were already subject to NPDES permitting, municipal discharges of stormwater, and stormwater discharges that the EPA determines on a case-by-case basis to be a significant contributor of pollutants. *See* 33 U.S.C. § 1342(p).

covering these categories of discharges. *See* 33 U.S.C. § 1342(p)(4)(A) (setting forth detailed deadlines).

As with the broader program for regulating point source discharges, in the area of stormwater regulation, when Congress meant to give wholesale exemptions to particular industries, Congress did so explicitly. To that end, the 1987 amendments specifically exempt from regulation "stormwater runoff from oil, gas, and mining operations." 33 U.S.C. § 1342(l)(2).

Even though the EPA has attempted to narrow its regulation of silvicultural activities, neither the 1977 nor the 1987 amendments to the Clean Water Act provided any ratification of the agency's silvicultural exclusions. Congress has never seen fit to exempt silvicultural point source from the NPDES program. To the extent that the EPA's interpretations of the Silvicultural Rule and Phase I rule would render a different outcome, the Court should reject those interpretations as contrary to the legislative structure and control that Congress has exercised in this area.

C. The EPA's Proffered Interpretations of the Silvicultural Rule Have Been Rejected Throughout the Rule's Regulatory History.

Despite years of rebukes and rejections of its interpretation, and despite prior statements that are

inconsistent with its interpretation,[6] the EPA once again advances an interpretation of the Silvicultural Rule that would create regulatory exclusions for point source discharges. Here, the EPA insists that the Silvicultural Rule means that "logging roads are not silvicultural point sources, even if the runoff from logging roads flows through a ditch, channel, or culvert before being released into waters of the United States." *See* U.S. Br. at 4.

The EPA makes two principal arguments in support of its position. First, the EPA argues that logging road runoff is not a point source because it falls outside of the four point sources enumerated in the Silvicultural Rule's definition of "silvicultural point sources." *See* U.S. Br. at 12. More specifically, the EPA's interpretation of the Phase I rule relies on the EPA's narrow construction of the Silvicultural Rule. *Id.* at 12 (noting that, with regard to the Phase I regulation's reference to the Silvicultural Rule, "EPA has construed that reference, however, as encompassing only discharges from the four subcategories of silvicultural facilities it had already identified as point sources in the Silvicultural Rule, which do not

---

[6] In 1990, the EPA published a notice regulatory interpretation explaining that "[d]ischarges which involved the intentional collection of contaminated runoff and its subsequent release from a discrete and identified point, on the other hand, were to be classified as a point source discharge subject to the NPDES program." 55 Fed. Reg. 20,521 (May 17, 1990). The EPA's position here – that collection of runoff is immaterial to the ultimate characterization of runoff as a point source – is directly contrary.

include runoff from logging roads"). Whether through its direct interpretation of the Silvicultural Rule or by virtue of its importation of the Silvicultural Rule into the Phase I rule, the EPA's attempt to limit the scope of regulation to four silvicultural point sources is of little consequence. The EPA's argument is one that has been squarely rejected.

Consistent with *Costle* and *Train*, *Forsgren* held that the EPA must regulate all point sources; it cannot create exemptions through regulation. As a result, the only basis upon which the EPA can argue that logging road runoff is not a point source is by applying the statutory definition supplied by Congress. Contrary approaches – namely attempts to exclude logging road runoff without considering the statutory definition of point source – have been routinely rejected and therefore are not entitled to deference on that basis.

The EPA's second argument focuses not on the Silvicultural Rule's identification of point sources, but on its inclusion of nonpoint source counterexamples. In particular, the current version of the Silvicultural Rule states:

> The term ["silvicultural point source"] does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction

> and maintenance from which there is natural runoff.

40 C.F.R. § 122.27 (2012). In this litigation, the EPA argues for the first time that all stormwater runoff from logging roads is "natural runoff," regardless of whether it is collected and discharged through discrete channels. *See* U.S. Br. at 12-13.

There are at least two problems with the EPA's interpretation of "natural runoff" in this case. Each of the problems undermines the legitimacy of deferring to the EPA.

First, the EPA's interpretation of "natural runoff" would exclude point sources from the NPDES program by lumping all types of runoff under the heading of nonpoint source pollution. To the extent that the EPA seeks to avoid regulating certain categories of silvicultural activities simply by excluding them or redefining them as nonpoint sources, that effort has been rejected by courts for nearly four decades.

Second, the EPA has argued that natural runoff includes "all precipitation-driven runoff from logging roads." *See* U.S. Br. at 4, 8. This claim cannot be squared with the 1987 Clean Water Act Amendments. In particular, if precipitation were the touchstone for determining whether runoff is a nonpoint source, then *all* stormwater would be nonpoint sources. After all, stormwater discharges are by definition triggered by precipitation events. The very fact that Congress requires stormwater regulation under the NPDES

program – a program aimed at point source regulation – means that not all stormwater discharges are nonpoint in nature. Indeed, Congress enacted the 1987 Amendments precisely because the EPA had not been regulating stormwater discharges as point sources as Congress had originally intended.

In sum, the EPA's interpretation of the Silvicultural Rule manifests a categorical reluctance to regulate stormwater runoff that is collected in ditches along logging roads. That interpretation is not only contrary to the statutory language but it is squarely at odds with the several rebukes of its cramped reading of the Clean Water Act. It is also at odds with the clear purpose of the 1987 Amendments. As such, the EPA's interpretation is not entitled to deference from this court.

III. *AUER* DEFERENCE RAISES THE RISK OF ARBITRARINESS WHEN AN AGENCY INTERPRETATION FAILS TO AFFORD THE REQUISITE FAIR NOTICE.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), this Court warned of the risk that "agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." The Government's arguments in this case implicate the Court's concerns regarding open-ended and imprecise regulations. The EPA's core contention is that the Silvicultural Rule is imprecise in its current form, U.S. Br. at 28-29, allowing the EPA to make ad

hoc determinations regarding what constitutes a silvicultural point source. The EPA implicitly argues the same thing with respect to its Phase I regulations, asserting that the text of its regulations "might not" foreclose respondent's claim. U.S. Br. at 26.

Respondent argues that the EPA's positions are plainly inconsistent with its regulations. But even if the EPA were correct that the regulations are ambiguous, deferring to the EPA's interpretations increases the risk of arbitrariness.

Put slightly different, the problem here is that the EPA is attempting to inject ambiguity into regulations that are clear. As a result, the EPA's efforts now implicate underlying notions of notice and fairness. This Court should be dubious about the EPA's contentions particularly when it is asked (1) to defer to interpretations of imprecise regulations when the agency has had an opportunity to clarify the imprecision but has chosen not to do so and (2) to accept agency interpretations that unnecessarily inject ambiguity into the regulations and make them imprecise.

A. Deferring to the EPA's Interpretation of the Silvicultural Rule Would Allow the Agency To Create De Facto New Regulations Through Litigation.

The regulatory history of the Silvicultural Rule makes clear that the EPA is not simply advancing an

argument in this case that has been rejected since the passage of the Clean Water Act. The regulatory history also highlights that the EPA created a gap where Congress did not sanction it to do so. The EPA then did nothing to fill the gap even when *Forsgren* and others told the agency that the Silvicultural Rule was incomplete and would not shield additional point sources from being required to obtain permits under the statute. In other words, a long history of rebukes by the court made the EPA well aware that it could not rewrite statutory mandates. And yet, the EPA chose to instead claim that its regulation was ambiguous and that it should now get deference for its interpretation in the litigation process.

Under those circumstances, where an agency has been told by several courts that its regulations do not cover all that the statute covers, but the agency nonetheless chooses to leave gap-filling to the interpretive process, deferring to agency interpretations under *Auer* would be inappropriate because it creates perverse incentives to leave inadequate regulations unaltered.

B. The Phase I Rule Would be Rendered Imprecise If the Court Were to Accept the EPA's Interpretation.

If this Court were to defer to the EPA's interpretation of the Phase I rule, the regulation would be rendered imprecise and separation of powers concerns

would arise. To be sure, the Phase I rule is not imprecise on its face. The Phase I regulations set out to identify the categories of industry whose stormwater discharges will be subject to the NPDES program. To aid in that identification, the EPA uses SIC Codes. 40 C.F.R. § 122.26(b)(14)(ii) (2012). The SIC Codes are meant to lend precision to the regulation. 55 Fed. Reg. 47,990, 48,010 (Nov. 16, 1990). By reference to SIC Codes, the EPA has included logging within the categories of industry whose stormwater discharge will be subject to regulation. 40 C.F.R. § 122.26(b)(14)(ii) (including industries falling within SIC 24, which includes logging).

Notably, the text of the Rule supplements the SIC Codes to include additional facilities or activities that the EPA has deemed important sources of stormwater discharge. To that end, the EPA deems the scope of industrial activities to include immediate access roads. 40 C.F.R. § 122.26(b)(14)(ii). In the Federal Register preamble, the EPA describes immediate access roads to include "haul roads." The EPA then clarified that "haul roads (roads dedicated to the transportation of industrial products) and similar extensions are required to be addressed in permit applications." 55 Fed. Reg. at 48,009.

In this case, the EPA seeks to refine its otherwise clear inclusion of logging as an industrial activity. To that end, the EPA argues that, while logging is an industrial activity, timber hauling and access for big

machines necessary to log (both indispensable parts of logging) are not industrial activities.[7] The Government explains this by saying that the EPA "intended" in the Phase I rule to refer to only certain silvicultural activities, notwithstanding its statement without qualification in the rule that SIC 24 – which includes logging – is covered. *See* U.S. Br. at 25. In other words, the EPA is asking this Court for deference on the ground that it "intended" its regulations to say something that the regulations do not.

In order to accept the EPA's spontaneous carve-out of timber access and hauling from the ambit of "logging," the Court would have to read imprecision into the Phase I rule. Namely, the Court would have to accept the premise that the SIC Codes are only a first approximation or ballpark estimate of the specific industrial processes that will actually be regulated. To that end, the Court would have to accept that the EPA is entitled to make more nuanced determinations in the course of litigation, rather than in the form of regulatory text, of which processes associated with any given industry referenced by the SIC Codes are meant to be regulated by the Phase I rule. In this way, the agency's proffered interpretation would create significant latitude for the agency to decide on an ad hoc basis that which the regulation purports to do on

---

[7] Notably, two of the point source silvicultural activities identified by the Silvicultural Rule – rock crushing and gravel washing – are processes directly associated with the construction of roads to be used for timber hauling.

its face – namely to identify industrial activities whose stormwater discharges are subject to the NPDES program. That process of identifying industrial activities is precisely the task Congress required the EPA to perform through notice and comment rulemaking. 33 U.S.C. § 1342(p).

Here, the regulation of stormwater discharge from silvicultural activities was not an unfamiliar topic to the EPA. It had been struggling with statutory compliance in the area for many years. If, under those circumstances, the EPA had wanted to exclude stormwater runoff from timber hauling – despite its inclusion of logging within the definition of industrial activity and despite its inclusion of haul roads within the ambit of industrial facilities – the EPA certainly bore the responsibility for doing so in the plain language of the regulation.

The agency's duty to provide clarity is in no way met by its reference to part 122 exclusions in the Phase I rule. Part 122 generally encompasses the EPA regulations covering the NPDES program. Regulations in part 122, therefore, include provisions like 40 C.F.R. § 122.3 that reiterate a variety of exemptions otherwise provided by Congress, such as return flows from irrigated agriculture or nonpoint sources. Reminding industries that the exclusions set forth in part 122 would be undisturbed by the Phase I rule merely confirms that the Phase I program does not mean to upset otherwise legitimate congressional exemptions to the NPDES program.

To the extent the EPA urges that the Phase I rule's reference to part 122 was intended to import previously rejected attempts by the EPA to regulate only some silvicultural point sources, that argument is unavailing. It would allow the EPA to accomplish through the back door what courts have long held it cannot do directly.

Deferring to the EPA's interpretation in this case would inject otherwise unambiguous regulations with imprecision. Moreover, deference would encourage the agency to adopt regulations that amount to little more than close-enough approximation, knowing that the details could be sorted out through litigation and that the court would defer to the agency's decisions under the guise of deferring to interpretations. If agencies are permitted to leave these details to case-by-case determinations, agencies could create de facto new regulation through litigation without ever providing adequate notice of those expectations prior to the litigation. *Auer* deference is therefore not warranted.

IV. *SKIDMORE* DEFERENCE IS ALSO NOT WARRANTED.

As in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), if *Auer* deference is not warranted, this Court must determine whether *Skidmore* deference is appropriate. For this, the Court will accord the "interpretation a measure of deference proportional to the '"'thoroughness evident in its consideration, the validity of its reasoning, its consistency

with earlier and later pronouncements, and all those factors which give it power to persuade.'"'" *Id.* at 2169 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

It is clear that no deference should be accorded to the EPA's interpretation under *Skidmore*. First, the EPA's interpretation is unpersuasive in that, as Respondent makes clear, it "is flatly inconsistent with" the Clean Water Act. *SmithKline*, 132 S. Ct. at 2169. It also "plainly lacks the hallmarks of thorough consideration" because, among other things, the United States announced its interpretation for the first time in an amicus brief in this litigation. *Id.* Finally, as courts since 1975 have concluded in their rebukes of the EPA's prior attempts to exempt silvicultural sources from the NPDES program, the EPA's reasoning is "wholly unpersuasive." *Id.* at 2170. As such, the EPA's interpretation warrants no deference under *Skidmore*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

AMY J. WILDERMUTH
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu

SANNE H. KNUDSEN
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 221-7443
sknudsen@uw.edu

Counsel for Amici Curiae